

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 01 March 2004**

CASE NO.: 2003-LHC-673  
2003-LHC-674  
OWCP NO.: 5-108630  
5-112013

In the Matter of:

HUBERT A. SELBY,  
Claimant,

v.

TIDEWATER STAFFING, INC.,  
Employer,

and

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS,  
Party-in-Interest.

Appearances:

Dana Adler, Rose, Esq.  
For Employer

Ronald Gurka, Esq.  
For Director

Before:

Stephen L. Purcell  
Administrative Law Judge

**DECISION AND ORDER**

This proceeding arises from a claim for disability compensation under the Longshore and Harbor Workers' Compensation Act ("Act" or "LHWCA"), 33 U.S.C. § 901 *et seq.* Employer is seeking Special Fund relief under Section 8(f) of the Act.

A formal hearing was scheduled in this case for May 20, 2003 in Newport News, Virginia on the sole issue of Employer's entitlement to Section 8(f) relief. Pursuant to the parties' request for an on-the-record decision, the hearing was cancelled, and Employer and the Director were ordered to submit briefs and evidence in support of their respective positions. Employer thereafter submitted Exhibits ("EX") 1 through 8 which were received on May 27, 2003 and are hereby admitted into evidence without objection. Employer further submitted its Brief in Support of Employer's Application for Section 8(f) Relief ("Emp. Br.") on June 23, 2003. The Director's Brief in Opposition to Application for Section 8(f) Relief ("Dir. Br.") was submitted on June 24, 2003.<sup>1</sup> The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

### FINDINGS OF FACT

According to medical records from Patient First – Newtown ("Patient First") in Virginia Beach, Virginia, Claimant was seen on November 9, 2000 for complaint of a back injury which occurred on October 30, 2000 when he was attempting to pull himself through a confined space and hyperextended his back. EX 1 at 1. Findings with respect to the back were "normal curvature without dimpling and significant paraspinal muscle spasm over the entire lumbar area. Multiple trigger points along the iliac crest. No pain at the sciatic notch. Negative straight leg raise. Deep tendon reflexes +2. Sensorium is intact." *Ibid.* There was no permanent defect noted (*i.e.* "PERM DEFECT N"). *Ibid.* A lumbar spine x-ray was ordered. *Ibid.*

Claimant was seen for a follow-up visit at Patient First on November 13, 2000. EX 1 at 1. He continued to complain of back pain which radiated down the right side without numbness or tingling. *Ibid.* On examination, Claimant had restricted range of motion in all planes, negative straight leg raising, deep tendon reflexes of +2, and intact sensorium. *Ibid.* Review of the previously ordered x-ray revealed arthritic changes with no acute fracture. *Ibid.*, EX 2. Medication and physical therapy were prescribed. EX 1 at 1. Diagnosis recorded was lumbar sprain, and permanent defect was again noted as none. EX 1 at 2.

A follow-up note dated November 18, 2000 reflects that Claimant was "walking okay and can transfer from floor to stretcher without difficulty but he has some [range of motion] problems with bending and flexion." EX 1 at 2. Donald T. Cashion, M.D., noted that Claimant was reluctant to return to work but specified that he could perform light duty with no prolonged sitting, standing, walking, or lifting of greater than 10 pounds. *Ibid.* Dr. Cashion noted "[m]ild degenerative spurring" and "[s]uspected spondylotic defect L5 [with] no evidence of spondylolisthesis." *Ibid.*, EX 2. Physical therapy three times per week for two weeks was ordered. EX 1 at 2. There was again an indication of no permanent defect. *Ibid.*

Claimant was seen again at Patient First on November 24, 2000 and stated that he was "feeling much better after all his physical therapy and wants to try to go back to work on Monday." EX 1 at 3. Range of motion was "pretty good," with full flexion, extension and

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<sup>1</sup> According to the Director, Employer first sought Section 8(f) relief in an application filed with the district director on August 30, 2002. Dir. Br. at 1. That application was denied by letter dated December 3, 2002, and the case was thereafter forwarded to the Office of Administrative Law Judges for hearing. *Ibid.*

rotation with no tenderness to palpation. *Ibid.* The final diagnosis noted was “[r]esolved lumbar strain,” and Claimant was released to work but cautioned to “be careful for another couple of weeks and not do anything too heavy.” *Ibid.* Permanent defect was again shown as negative. *Ibid.*

On March 5, 2001, Beth M. Winke, M.D. examined Claimant at the request of Employer for complaints of low back pain. EX 4. Her report of examination notes that Claimant returned to full duty on November 9, 2000 after his October 30, 2000 injury, and further states that on March 1, 2001 he re-injured his back when he was kneeling on a cat walk, reaching under a hand rail. *Ibid.* Claimant reported back and right leg pain with numbness, and described the level of pain as ranging from two to nine on a ten-point scale. *Ibid.* Physical examination by Dr. Winke revealed:

The patient is overweight. He is 5’ 11” and weighs 300 pounds. In stance pelvis is level. Forward bending is 75% with symptoms at extreme forward bending. Extension is full without symptoms. Side bending to the right is about 50% of normal with increased symptoms. Side bending to the left causes mild symptoms. His reflexes are +2 and symmetric at the knees and at the ankles. He has thickened skin over his knees bilaterally. He has some abrasions on his lower legs. Pulses are +2. Strength of the lower extremities is 5/5. Sensation is decreased along the lateral aspect of his right lower leg and on the lateral aspect of his right foot. Straight leg raise is to 70 degrees bilaterally without leg symptoms. Hips with full symmetric range of motion. Tenderness within the right quadratus lumborum at the level of L5-S1. Negative tenderness over the buttocks or over the greater trochanters. Modified Thomas test negative.

EX 4 at 1-2. Dr. Winke noted impressions of chronic low back pain which started October 2000, chronic lumbar strain with involvement of the right quadratus lumborum, and intermittent right lower extremity symptoms of pain and numbness, rule out possibility of radiculopathy. *Ibid.*

Dr. Winke again saw Claimant on March 27, 2001 and noted numbness and tingling in the right lower extremity and pain “localized to the right lateral aspect of his back.” EX 4 at 3. Similar impressions to those previously recorded were noted, and Claimant was then scheduled to undergo an MRI on April 10, 2001. *Ibid.*

Dr. Winke saw Claimant on April 17, 2001, and noted in her report of examination that the MRI of Claimant’s back revealed L4-5 degenerative disc disease with right sided disc bulge and mild foraminal encroachment, as well as “more minimal degenerative disc at L5-S1.” EX 4 at 6, EX 5.

According to an “Initial Spine Care Center Evaluation” report prepared by Dr. Winke on April 19, 2001, Claimant had spondylosis of the lumbar spine, lumbar deconditioning, and lumbar strain. EX 4 at 9. Similar impressions were noted by Dr. Winke between April 30 and August 14, 2001. EX 4 at 11-24.

On November 6, 2001, Dr. Winke wrote the following to Dana Boykin, Claimant's workers compensation case manager:

In regards to your letter dated October 24th regarding Mr. Selby, the patient's original injury occurred on 10/30/00. On 3/5/01, the patient experienced an aggravation of this underlying injury. In regards to your question about obesity, it is difficult to determine how much of his current problem is attributable to excess weight. A weight loss program would be recommended in regards to his current back problem as well as for general health. Therefore, a dietary consultation may be in order.

EX 4 at 25.

A follow-up report from December 14, 2001 continues to reflect impressions of chronic low back pain, degenerative disc disease, and also notes history of right lower extremity deep vein thrombosis which was not attributed in any way to Claimant's work injury or low back pain. EX 4 at 26.

A February 21, 2002 letter from Dr. Winke to Claimant's medical case manager states that Claimant's chronic low back pain is a result of degenerative disc disease and right L4-5 foraminal narrowing with disc protrusion at L4-5 and L5-S1 with right lower extremity symptoms and possible radiculopathy. EX 4 at 28. Her letter further notes that there were no signs or symptoms of an SI joint dysfunction. *Ibid*.

In a July 26, 2002 letter to Employer's attorney, Dr. Winke wrote that Claimant had "a pre-existing permanent condition" as a result of his work-related injury on October 30, 2000. EX 7. She further wrote:

Mr. Selby's degenerative disc disease did exist prior to the work-related injury of October 30, 2000. Mr. Selby returned to work, but in March 2001, sustained a second injury to the same area of his low back where he was previously injured. This is the area which had previously demonstrated degenerative changes.

I can state with a reasonable degree of medical probability that the pre-existing degenerative disc disease and the October 2000 injury made Mr. Selby more susceptible to the injury which he sustained in March 2001. It is not unusual for patients demonstrating findings consistent with those of Mr. Selby to be candidates for another injury at the same level.

From my review of the records and from the care and treatment of Mr. Selby, I do not believe that the March 2001 event alone would have resulted in the same degree of disability which Mr. Selby now experiences. I would estimate that of the claimant's present disability, 25% is assignable to his pre-existing degenerative disc disease, 25% would be attributable to the October 30, 2000 accident, and the remaining 50% attributable to the March 2001 injury. Clearly Mr. Selby's pre-existing permanent partial disability contributes to the ultimate

permanent partial disability he now suffers, which prevents him from returning to his regular pre-injury employment. Mr. Selby's present condition is materially and substantially greater because of his pre-existing degenerative condition of his lumbar spine and the October 30, 2000 injury than it would have been simply from the March 2001 injury.

*Ibid.*

In another letter to Employer's attorney dated March 31, 2003, Dr. Winke wrote:

Pursuant to the AMA Guides, 5th Edition, Mr. Selby has a 15% whole body impairment. 25% of this is assignable to his pre-existing degenerative disc disease, 25% is attributed to the October 30, 2000 back accident, and the remaining 50% attributable to the March 2001 back injury.

EX 8. Dr. Winke also wrote that she did not believe the March 2001 accident "alone would have resulted in the same degree of disability which Mr. Selby now experiences," and reiterated her opinion that his pre-existing permanent partial disability contributed to the permanent partial disability that he then had. *Ibid.*

#### ARGUMENTS OF THE PARTIES

Employer asserts that Claimant had permanent partial disabilities resulting from his October 30, 2000 back injury and degenerative disc disease with suspected spondylitic defect at L5 prior to his March 2001 back injury. Emp. Br. at 2-4. It further argues that these pre-existing conditions combined with the March 2001 injury to cause a greater disability than that which would have resulted from the second injury alone. Emp. Br. at 5-16. Finally, it asserts that these conditions were manifest to it through medical and other records in its possession from the time of the October 30, 2000 incident and that Claimant's current permanent disability is not due solely to his March 1, 2001 back injury. Emp. Br. at 17-20.

The Director argues that Employer's request for Section 8(f) relief must be denied because Claimant's lumbar sprain from the October 30, 2000 injury had completely resolved by the time of his March 2001 injury and his "mild degenerative spurring" is not a condition resulting in a serious physical disability that might motivate a cautious employer to discharge an employee because of a greatly increased risk of potential compensation liability. Dir. Br. at 4-7. The Director concedes that these pre-existing conditions were manifest to Employer prior to the March 2001 injury. Dir. Br. at 7. He argues, however, that Employer has failed to meet its burden of submitting sufficient credible evidence to quantify the extent of disability caused by the March 2001 injury alone so that a determination may be made as to whether the ultimate permanent partial disability is materially and substantially greater than it otherwise would have been. Dir. Br. at 8-12.

## DISCUSSION

Section 8(f) shifts part of the liability for a claimant's disability from the employer to the Special Fund, established under Section 44 of the Act, when the disability is not due solely to the injury which is the subject of the claim. In construing Section 8(f), the courts have repeatedly stated that Section 8(f) was enacted to avoid discrimination against handicapped workers, which would naturally flow from the aggravation rule. *See, e.g., Director, OWCP v. Campbell Indus.*, 678 F.2d 836, 839, 14 BRBS 974 (9<sup>th</sup> Cir. 1982). In order to qualify for this relief, an employer "must make a three-part showing: (i) that the employee had a pre-existing partial disability, (ii) that this partial disability was manifest to the employer, and (iii) that it rendered the second injury more serious than it otherwise would have been." *Director, OWCP v. Berkstresser*, 921 F.2d 306, 309, 24 BRBS 69 (CRT) (D.C. Cir. 1990). It is the employer's burden to prove each of these elements. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Langley)*, 676 F.2d 110, 114 (4<sup>th</sup> Cir. 1982); *Director, OWCP v. Campbell Industries*, 678 F.2d 836 (9<sup>th</sup> Cir. 1982); *Bullock v. Sun Shipbuilding & Dry Dock Co.*, 13 BRBS 381 (1981).

### Pre-Existing Permanent Partial Disability

Aggravation of a pre-existing disability during employment constitutes a second injury. *Bath Iron Works Corp. v. Director, U.S. Dept. of Labor*, 193 F.3d 27 (1<sup>st</sup> Cir. 1999) (asbestos-related injury aggravated by further exposure to pulmonary irritants subsequently found to be "new" injury resulting in increase in benefits payable by new carrier); *Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 625, 25 BRBS 71 (CRT) (9<sup>th</sup> Cir. 1991), *aff'g* 22 BRBS 453 (1989) (claimant's pre-existing disability to back aggravated by six months of jack hammering); *Director, OWCP v. Potomac Elec. Power Co.*, 607 F.2d 1378, 1385, 10 BRBS 1048 (D.C. Cir. 1979), *aff'g* *Brannon v. Potomac Elec. Power Co.*, 6 BRBS 527 (1977) (work-related trauma (first injury) caused mental disease which was aggravated by reexposure to "energized" equipment (second injury) which led to claimant's suicide). However, the fact that a claimant has suffered some past injury is, without more, insufficient to establish the existence of a pre-existing disability. That injury must have resulted in a "serious lasting physical problem." *Director, OWCP v. Belcher Erectors, Inc.*, 770 F.2d 1220, 1222 (D.C. Cir. 1985).

Employer argues that Claimant's lumbar strain and degenerative disc disease with suspected spondylitic defect at L5 are permanent partial disabilities which pre-existed his March 1, 2001 back injury. Emp. Br. 1-2. Neither of these conditions, however, amount to serious lasting physical problems that would motivate a cautious employer to discharge the employee out of concern for increased compensation liability. *Belcher Erectors, Inc.*, 770 F.2d at 1222; *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 513 (D.C. Cir. 1977).

As noted above, Claimant was seen at Patient First on November 9, 2000 for complaint of a back injury which occurred on October 30, 2000 when he was attempting to pull himself through a confined space and hyperextended his back. EX 1 at 1. Claimant was diagnosed with lumbar strain, and subsequent treatment records reflect that the condition had resolved by November 24, 2000 and resulted in no permanent defect. EX 1 at 3. Claimant was released to work without restriction, although he was cautioned to "be careful for another couple of weeks and not do anything too heavy." *Ibid*. There is no evidence that he thereafter missed any work

because of his October 30, 2000 injury until he re-injured his back on March 1, 2001. Claimant thus had no permanent partial disability resulting from his October 30, 2000 injury.

Employer's contention that Claimant's degenerative disc disease of the lumbar spine constituted a permanent partial disability must be rejected for the same reasons. An x-ray of Claimant's spine on November 9, 2000 revealed "mild degenerative spurring" and "[s]uspected spondylotic defect at L5 with no evidence of spondylolisthesis." EX 2. These conditions, however, were clearly known to Claimant's treating physicians when they released him to work on November 24, 2000 without restrictions. Claimant thus had no "serious lasting physical problem," *Belcher Erectors, Inc.*, 770 F.2d at 1222, prior to his second injury on March 1, 2001 which would have motivated Employer to discharge him "because of a greatly increased risk of employment-related accident and compensation liability." *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 513 (D.C. Cir. 1977).

In an attempt to establish that Claimant had a permanent partial disability before his second injury, Employer offers the opinion of Dr. Winke who, at Employer's request, began treating Claimant on March 5, 2001. The first time she described Claimant's condition prior to his March 1, 2001 injury as a "pre-existing permanent condition" is in a letter dated July 26, 2002 to Employer's attorney. EX 7. Dr. Winke wrote, *inter alia*:

Mr. Selby sustained a work-related injury on October 30, 2000. At that time, he was diagnosed with a lumbar strain and treated conservatively. The x-rays taken on November 9th, 2000, revealed degenerative disc disease with a suspected spondylitic defect at L5. He also had small osteophytes anteriorly at L4-5.

Based on these findings, the patient had a pre-existing permanent condition. Mr. Selby's degenerative disc disease did exist prior to the work-related injury of October 30, 2000. Mr. Selby returned to work, but in March 2001, sustained a second injury to the same area of his low back where he was previously injured. This is the area which had previously demonstrated degenerative changes.

*Ibid.*<sup>2</sup> However, Dr. Winke's characterization of Claimant's pre-March 2001 condition as "permanent" is insufficient to meet the first prong of the three-part test under Section 8(f).

For a condition to be considered a "permanent partial disability" under Section 8(f), the condition must be a lasting physical problem *and* serious enough to cause a cautious employer to discharge the worker out of concern over "a greatly increased risk of employment-related accident and compensation liability." *C&P Telephone Co.*, 564 F.2d at 513. The lumbar strain referenced by Dr. Winke had, as noted previously, clearly resolved prior to Claimant's March 1, 2001 injury, EX 1 at 3, and was thus not a "lasting physical problem." Furthermore, even assuming Claimant's degenerative disc disease is a "lasting physical problem," Dr. Winke's opinion provides no basis for concluding that it was serious enough to cause Employer to discharge Claimant out of concern that there was a "greatly increased risk" that he would sustain

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<sup>2</sup> In a two-paragraph letter dated March 31, 2003, Dr. Winke reiterated her opinion that Claimant had a pre-existing permanent partial disability which contributed to the injury he sustained on March 1, 2001 and resulted in a more significant permanent partial disability than would have been caused by the March 1, 2001 injury alone. EX 8.

another employment-related injury. Indeed, as noted above, Employer allowed Claimant to return to work on or about November 24, 2000 despite its knowledge of this condition.

Based on all the evidence of record, Employer has thus failed to establish that Claimant had a pre-existing permanent partial disability which would entitle it to Special Fund relief. This failure of proof would alone be a sufficient basis for denying the claim. *Langley*, 676 F.2d at 114. However, as explained below, Employer has also failed to establish that Claimant's current permanent partial disability materially and substantially exceeds the disability that would have resulted in the absence of any pre-existing disability.<sup>3</sup>

### Second Injury Contributing to Disability

According to the Fourth Circuit, an employer must, in order to qualify for Section 8(f) relief, establish that a "subsequent work-related injury alone would not have caused the employee's ultimate permanent partial disability and that the ultimate permanent partial disability materially and substantially exceeded the disability that would have resulted from the work-related injury alone, in the absence of the pre-existing condition." *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Harcum)*, 8 F.3d 175, 182-83 (4th Cir. 1993). The court explained:

To satisfy this . . . contribution element, the employer must show by medical evidence or otherwise that the ultimate permanent partial disability materially and substantially exceeds the disability as it would have resulted from the work-related injury alone. A showing of this kind requires quantification of the level of impairment that would ensue from the work-related injury alone. In other words, an employer must present evidence of the type and extent of disability that the claimant would suffer if not previously disabled when injured by the same work-related injury. Once the employer establishes the level of disability in the absence of a pre-existing permanent partial disability, an adjudicative body will have a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater.

*Id.* at 185-186. See also, *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Carmines)*, 138 F.3d 134, 139 (4th Cir. 1998); *Newport News Shipbuilding and Dry Dock Co. v. Ward*, 326 F.3d 434, 439 (4th Cir. 2003). When determining whether the contribution element has been met, the ALJ may not "merely credulously accept the assertions of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based." *Carmines*, 138 F.3d at 140. Furthermore, "[i]t is not enough . . . to simply calculate the total current disability and subtract from it the disability resulting from the preexisting condition." *Newport News Shipbuilding and Dry Dock Co. v. Winn*, 326 F.3d 427, 432 (4<sup>th</sup> Cir. 2003). Nor may the ALJ "merely credit the doctor's opinion, but must evaluate that opinion in light of the other evidence in the record." *Carmines*, 138 F.3d at 140 n.

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<sup>3</sup> The evidence of record in this case establishes, as the Director concedes, that Claimant's pre-existing lumbar strain and mild degenerative spurring of the lumbar spine were manifest to Employer before his March 1, 2001 injury. Employer has thus met the second prong of the three-part test under Section 8(f).

5, citing *Gordon v. Schweiker*, 725 F. 2d 231 (4th Cir. 1984) and *Eagle v. Armco, Inc.*, 943 F.2d 509, 511 n. 1 (4th Cir. 1991).

In the instant case, the only evidence offered by Employer to show that Claimant's ultimate permanent partial disability is materially and substantially worse than the disability which would have resulted from Claimant's March 1, 2001 work-related injury alone is the two letters from Dr. Winke. EX 7, EX 8. For several reasons, I find that neither of these opinion letters satisfies the criteria required under Section 8(f).

First, Dr. Winke's letters do not quantify the portion of Claimant's disability that would have resulted in the absence of the October 30, 2000 lumbar strain and the pre-existing degenerative disc disease revealed in the November 9, 2000 x-ray. In her July 26, 2002 letter, Dr. Winke simply states, in relevant part:

I would estimate that of the claimant's present disability, 25% is assignable to his pre-existing degenerative disc disease, 25% would be attributable to the October 30, 2000 accident, and the remaining 50% attributable to the March 2001 injury.

EX 7. Her March 31, 2003 letter similarly states:

Pursuant to the AMA Guides, 5<sup>th</sup> Edition, Mr. Selby has a 15% whole body impairment. 25% of this is assignable to his pre-existing degenerative disc disease, 25% is attributed to the October 30, 2000 back accident, and the remaining 50% attributable to the March 2001 back injury.

EX 8. In neither letter does Dr. Winke offer any opinion with respect to the degree of disability that would have resulted from Claimant's March 1, 2001 injury *alone*.

Second, Dr. Winke's opinions are similar to the generalized assertions and conclusions which were condemned by the Fourth Circuit in *Ward*. There, the employer relied on a physician's statements in a two-page letter that: the claimant's disability was not caused by a 1987 back injury alone, but rather was materially contributed to, and made materially and substantially worse, by a 1989 back injury; neither the 1987 back injury nor the 1989 back injury alone would have disabled the claimant from performing light duty; if the claimant had a normal back when he suffered the 1989 injury, he would have been able to return to light duty; and the combination of the two injuries and their cumulative effect disabled the claimant from even light duty. *Ward*, 326 F.3d at 437. In upholding the decision denying Section 8(f) relief, the court wrote:

Unfortunately for [the employer, the physician's] assertions are generalized and his overall conclusion lacks any supporting explanation. In particular, his statement that [the claimant] would have been able to "return to light duty Shipyard work" *if* he had suffered only one of his back injuries, is conclusory and lacks evidentiary support. Indeed, [the physician's] statements are far different from the "objective quantification" and clear descriptions that were present in *Harcum II*, 131 F.3d at 1082. As the ALJ found, [the physician] "does not refer

to any evidence justifying [his] conclusion, nor does he explain how he arrived at it.”

*Id.* at 442 (italics in original). Both of the letters authored by Dr. Winke in this case suffer from the same deficiencies. She states in her July 26, 2002 letter, without explanation, that: Claimant’s pre-existing degenerative disc disease and October 2000 lumbar strain made Claimant more susceptible to further injury; she does not believe that the March 2001 event alone would have resulted in the same degree of disability which Claimant now experiences; 25% of Claimant’s disability is attributable to his pre-existing degenerative disc disease; 25% of his disability is attributable to his October 30, 2000 lumbar strain; 50% of his disability is attributable to his March 2001 injury; his pre-existing disability contributes to his ultimate permanent partial disability and prevents him from returning to his pre-injury employment; and his ultimate disability is substantially greater than it would have been but for the pre-existing conditions. EX 7. The second opinion letter from Dr. Winke, dated March 31, 2003, simply repeats her earlier unsupported conclusions, adding only that Claimant has a 15% whole body impairment pursuant to the AMA Guides, 5<sup>th</sup> Edition. EX 8. Neither letter describes the evidence upon which Dr. Winke relied in support of her conclusions, nor do they explain the process by which she arrived at those determinations. These conclusory statements are insufficient to satisfy the contribution element needed to justify Section 8(f) relief.

Third, as the Fourth Circuit has clearly stated, “[i]t is not proper simply to calculate the current disability and subtract the disability that resulted from the pre-existing injury . . . .” *Carmines*, 138 F.3d at 143. If the second injury alone is sufficient to cause the ultimate level of disability, entitlement to Section 8(f) relief is not warranted since that disability is not materially and substantially greater than it would have been but for the pre-existing condition. *Ibid.*, see also *Ward*, 326 F.3d at 439 (quantification aspect of contribution element provides ALJ with basis for determining whether ultimate disability is materially and substantially greater than disability caused by second injury alone). As noted above, Dr. Winke’s opinion letter of March 31, 2003 asserts (without explanation) that Claimant has a 15% whole body impairment pursuant to the AMA Guides, of which half is attributable to his March 2001 back injury and the remainder is attributable, in equal parts, to his lumbar strain and degenerative disc disease. EX 8. Since she neglects to state what level of disability would have resulted from Claimant’s March 1, 2001 injury alone, it is not possible to determine whether Claimant’s disability now is materially and substantially worse than it would have been had Claimant never had degenerative disc disease or suffered a lumbar strain in October 2000.

Fourth, and finally, Dr. Winke’s two opinion letters attribute 25% of Claimant’s present permanent partial disability to the lumbar strain caused by his October 2000 injury. EX 7, EX 8. However, nowhere in her correspondence, or her treatment records, does Dr. Winke explain why she implicitly disagrees with the opinions of the physicians who treated Claimant at the time of that injury that his lumbar strain had completely resolved by November 2000. EX 1 at 3. Her conclusions are “pure conjecture . . . bereft of supporting data or medical analysis.” *Newport News Shipbuilding and Dry Dock Co. v. Cherry*, 326 F.3d 449, 453 (4<sup>th</sup> Cir. 2003). Evaluating these opinions “in light of the other evidence in the record,” *Carmines*, 138 F.3d at 140 n. 5, I find they are entitled to no weight.

The lack of credible evidence establishing that Claimant's current permanent partial disability is materially and substantially greater as a result of his March 1, 2001 injury than it would have been without the October 2000 injury and pre-existing degenerative disc disease is fatal to Employer's Section 8(f) claim. *Carmines*, 138 F.3d at 143-44. Thus, even if Employer had established that Claimant suffered from a pre-existing permanent partial disability before his March 1, 2001 injury, which it has not, it would not be entitled to Special Fund relief.

### **ORDER**

Based on the foregoing reasons, IT IS HEREBY ORDERED that the claim of Tidewater Staffing, Inc. for relief under Section 8(f) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 908(f), is DENIED.

**A**

STEPHEN L. PURCELL  
Administrative Law Judge

Washington, D.C.